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No. 404

In the Supreme Court of the United States

OCTOBER TERM, 1955

OFFUTT HOUSING COMPANY, A CORPORATION,
PETITIONER

v.

COUNTY OF SARPY AND ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

SIMON E. SOBELOFF,
Solicitor General,
H. BRIAN HOLLAND,
Assistant Attorney General,
ELLIS N. SLACK,
HILBERT P. ZARKY,
ERWIN A. GOLDSTEIN,
LYLE M. TURNER,
Attorneys,
Department of Justice,
Washington 25, D. C.

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The United States respectfully urges the Court to grant the petition for a writ of certiorari which has been filed in this case.

The issue which this case poses is one of importance to the United States. The litigation affects the welfare of the personnel of its Armed Forces, and the Judge Advocate Generals of the Army and the Air Force and the General Counsel of the Navy have requested the Solicitor General to urge this Court to review the decision of the Supreme Court of Nebraska. Further, the case is important to many of the states since it concerns the proper scope and administration of their taxing laws.

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The Government shares petitioner's view that neither the language, purpose nor legislative history of the Act of August 8, 1949, c. 403, 63 Stat. 570, known as the Wherry Act, discloses a Congressional purpose to permit state or local taxation of military housing projects constructed upon federal enclaves. It likewise agrees that, even assuming, as respondents urge, that Congress consented to the taxation of the lessee's interest in such projects, the attempt at taxation made in this

case is void in that it exceeded the Congressional waiver by imposing taxes measured by the full value of Government-owned property. It is not the purpose of this memorandum to repeat in detail petitioner's able and comprehensive discussion and analysis of these issues, but merely to outline the reasons dictating the Government's position.

1. The avowed purpose of the Wherry Act to provide clean, adequate and *inexpensive* housing to encourage skilled military personnel to remain in the armed forces[1] makes it unlikely that Con-

[1] The legislative history makes it indisputably clear that the prime purpose of the Wherry Act was to help servicemen obtain low-rent housing within their means. See H. Rept. No. 854, 81st Cong., 1st Sess., pp. 2, 5 ("the achievement of lower rentals for the personnel of the establishment"); S. Rept. No. 410, 81st Cong., 1st Sess., pp. 4-5 ("housing at rents within the means of as many enlisted personnel and junior officers as possible").

The Act was passed because the armed services need large numbers of technicians and skilled personnel who have had many years of technical training. These persons cannot be replaced on short notice and the Government seeks to offer every inducement that will insure the retention of their services. One of these inducements is to make good housing available on or adjacent to military installations. To serve the purpose of attracting and retaining the services of these persons, the housing must not only be good, it must also be modest in cost.

The Act attempted to keep the cost and rentals of the housing projects at a minimum. This was done by making available government guaranteed loans, by the elimination of land and acquisition costs through the use of government lands, by restricting the investment in the individual unit, and by close supervision and control of operating costs, profits and rents.

See the Appendix, *infra*, p. 9, for a statistical summary of the Air Force's Wherry Act projects (supplied by the Air Force).

The basic purpose of the Act of August 8, 1949, c. 403, 63 Stat. 570, commonly called the "Wherry Act," was to provide clean, comfortable and adequate housing for military personnel and their families at rentals within their limited means. The Armed Services need large numbers of technicians and skilled personnel who have had many years of technical training. These persons cannot be replaced on short notice and the Government seeks to offer every inducement that will insure the retention of their services. One of these inducements is to make good housing available on or adjacent to military installations. To serve the purpose of attracting and retaining the services of these persons, the housing must not only be good, it must also be modest in cost.

The Wherry Act attempted to keep the cost and rentals of the housing projects at a minimum. This was done by making available government guaranteed loans, by the elimination of land and acquisition costs through the use of government lands, by restricting the investment in the individual unit, and by close supervision and control of operating costs, profits and rents.

The issue in this case involves the authority of local taxing units to impose *ad valorem* taxes where the housing project is located on a military reservation over which the United States exercises exclusive legislative jurisdiction. The court below has held that the Wherry Act, by incorporating by reference a part of the Act of August 5,

1947, c. 493, 61 Stat. 774, commonly referred to as the "Military Leasing Act", constituted Congressional consent to the exercise of jurisdiction by the local taxing authorities.

If, as we believe, the court below was wrong in concluding that Congress had receded jurisdiction so as to permit the taxing of property located within a federal enclave, it is clear that the sovereign jurisdiction of the United States has been invaded. And, to the extent that such taxes have been imposed on property belonging to the United States, it is clear that the sovereign immunity of the United States has been violated. Further, to the extent that these housing projects are burdened by local taxes, the burden of the tax will be reflected in increased rentals paid by the military personnel, thus tending to defeat one of the purposes of the Wherry Act.

The dispute in this case is not an isolated one. As petitioner has pointed out, military housing has been erected and is being operated in many jurisdictions under circumstances substantially the same as those here involved. With increasing frequency, local authorities are assessing *ad valorem* taxes on like properties located within other areas over which the United States asserts the right to exercise exclusive legislation. And, in many cases, local authorities are assessing military housing properties in the same manner and to the same extent as though the projects were

gress would have departed from its established practice of consenting to local taxation on federal enclaves only in the clearest and most explicit terms. On the contrary, if Congress had intended to authorize local taxation within a federal enclave, taxation which might reasonably have been expected to hamper one of the principal objectives of the legislation by forcing rental increases to cover increased costs, it would have done so in the plainest language possible and would not have permitted such an important matter of jurisdiction to rest on elaborate implication.

Neither of the provisions of the Wherry Act relied upon by respondents as showing Congressional consent can be described as a clear waiver of federal immunity to state taxation. Section 805 of the Act (12 U.S.C. 1748d), on which the court below relied, does not in terms mention state taxation. Respondents' argument and the decision below justify their conclusion by drawing upon the reference in Section 805 to the Act of August 5, 1947, c. 493, 61 Stat. 774, commonly called the Military Leasing Act. Section 6 of the Leasing Act (5 U.S.C. 626s-6) contains among its provisions the following: "The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation." However, as petitioner's brief points out in detail (pp. 23-35), there are no compelling reasons to make either of the suppositions vital to respondents' position—that the Wherry Act reference to the Leasing Act was intended to incorporate this

owned, not by the United States, but by the lessees.

It is also a matter of obvious importance to the many states in which these projects are located that this Court should settle the question whether Congress has granted them the jurisdiction to impose such *ad valorem* taxes. Until there has been a definitive decision, which only this Court can render, the local taxing authorities will be confronted with serious difficulties in deciding whether to collect these taxes and in determining what to do with the tax proceeds pending a final resolution of the basic issue.

We think that the lower court erred in concluding that Congress intended to recede to the states and local authorities jurisdiction to tax real property within a federal area. Such a retrocession, being in derogation of the sovereign's powers, should be found only where Congress has spoken in the clearest language; it should not rest on implication. The Wherry Act, in referring to the Leasing Act, did not clearly indicate that consent was being granted to tax any interest in real property where the property is located in a federal enclave, if, indeed, consent to taxation anywhere was being granted. Moreover, the legislative history of the Wherry and Leasing Acts would indicate that Congress undoubtedly did not intend that housing projects being erected on military installations should be subject to local taxes.

sentence of Section 6 of the Leasing Act, or that the sentence when originally inserted in the Leasing Act was intended by Congress as a consent to tax a lessee's interest in property located upon a federal enclave.

Section 805 of the Wherry Act authorizes each Secretary of the Armed Forces to make leases "under the authority of said [Leasing] Act upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said Act in respect to the term or duration of the lease * * *". Both the authority to lease and the limitations imposed with respect to the duration of the leases appear in Section 1 of the Leasing Act (5 U.S.C. 626s). Accordingly, there is no reason to attribute to Congress an intent to incorporate more of the Leasing Act than the provisions of that section. Nothing in the language of Section 805 requires that the balance of the Act be incorporated, and Sections 2 through 5 are clearly and indisputably inapplicable in the context of the Wherry Act. There is certainly no ground for believing that there was a special purpose to single out Section 6 of the Leasing Act for incorporation.

Moreover, there is ample room to doubt whether even in the Leasing Act the controversial sentence of Section 6 was intended to apply to interests in property located upon federal enclaves. The provision does not so declare in terms. No statement in the legislative history of the Leasing Act reveals such an aim. The purpose of the Act—to utilize

for private enterprise Government-owned manufacturing facilities temporarily surplus to the needs of armed forces, and normally located outside federal enclaves—does not require that construction. Under these circumstances there is no warrant for assuming that Congress was receding to the states jurisdiction formerly exclusive to the United States.

Section 807 of the Wherry Act (12 U.S.C. 1748f) is the only section of that Act which mentions taxation directly. But, as the court below conceded (R. 199), it cannot be interpreted as authorizing the taxes imposed by respondents in this case. The section provides: "Nothing in this title shall be construed to exempt any real property acquired and held by the [Federal Housing] Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed." The section has no application to this case, not only because the Offutt project was not held or acquired by the Commissioner, but also because the provision is only negative in operation. It prevents property from becoming non-taxable under certain circumstances, but does not waive existing immunities, such as that enjoyed by property located upon federal enclaves.

2. Even if Congress intended by its reference to the Leasing Act in the Wherry Act to subject to local taxation the *lessee's interest* in property located upon federal enclaves, the taxes imposed by respondents are invalid in that they exceed the

Finally, even if it is concluded that Congress did intend to grant to the states jurisdiction to tax, the court below plainly disregarded the limitations of the statutes which it thought granted the retrocession. That is, if Congress did recede tax jurisdiction, it clearly limited its consent to the taxing of the interest of the lessee and did not consent to the taxation of the property owned by the United States as lessor. The court below, however, did not limit its decision in this manner. It upheld the assessment even though there was no effort to segregate Offutt Housing Company's interest and tax only that interest; the full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Offutt Housing Company's assessment. *United States* v. *Allegheny County*, 322 U. S. 174, 187, shows that such a conclusion is wrong.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Asistant Attorney General.
ELLIS N. SLACK,
HILBERT P. ZARKY,
ERWIN A. GOLDSTEIN,
LYLE M. TURNER,
Attorneys.

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